IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20-6-2005

Coram:

The Honourable Mr. Justice T.V. MASILAMANI

S.A. No.745 of 1993

1. Sivakozhundu
2. Selvaraj
3. Sakunthala
4. Rajamani
5.Mallika .. Appellants/
Defendants 2to6

vs.

1. Saraswathi
2. Sarada
3.Chakkubai (died)
(Respondents Rep. By their father
and power agent Sivasubramania chettiar)
4. S. Rajasekaran .. Respondents/
[R4 is brought on record as L/Rs. Of Plaintiffs
the deceased R3 Chakkuboi (vide)
order dated 29.12.2004
in C.M.P.no.20853 of 2004]

Second Appeal against the judgment and decree dated 26.8.1992 made in A.S.No.16 of 1992 on the file of the Additional Subordinate Court, Cuddalore confirming the judgment and decree dated 10.4.1991 in O.S.No.769 of 1987 on the file of the Additional District Munsif, Cuddalore.

For Appellants : Mrs.Hema Sampath

For Respondents : Mr.T.R.Rajaraman
for R1,2, and 4

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JUDGMENT

The defendants 2 to 6 in the suit are the appellants.

2. The respondents/plaintiffs filed the suit through their power of attorney for declaration and recovery of possession of the suit

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property after removal of the superstructure and for mesne profits. Since the appellants/defendants resisted the suit by filing the written statement, the trial court having recorded the evidence, heard the arguments of both sides and decreed the suit as prayed for with costs and also directed the defendants to pay Rs.300/- per month to the plaintiffs towards mense profits.

3. Aggrieved by the judgment and decree passed by the trial court, the defendants filed the appeal before the Subordinate Court, Cuddalore in A.S.No.16 of 1992. The learned Subordinate Judge after perusing the recorded evidence and upon hearing the arguments of both sides rendered a concurrent finding by confirming the judgment and decree passed by the trial court and dismissed the appeal with costs. Hence, the Second Appeal.

4. The averments in the plaint filed by the respondents/plaintiffs are briefly as follows:-

(a) The suit property originally belonged to Meenakshi Ammal, mother of the plaintiffs and she was in possession and enjoyment of the suit property and other properties in her own right as absolute owner thereof. While so, in a sound and disposing state of mind, she had executed a registered will dated 14.11.1969 bequeathing her properties in favour of her daughters, the plaintiffs herein. The said will and testament came into force after the death of Meenakshi Ammal on 26.11.1969 and since then, the plaintiffs have become absolute owners of the suit and other properties bequeathed under the said will. The plaintiffs executed the power of attorney deed in favour of the 3rd plaintiff's husband Sivasubramania Chettiar who is in actual management of the properties.

(b) The suit sale agreement was entered into between the first defendant and the power of attorney representing the plaintiffs. The first defendant executed the agreement for sale on 29.11.1978 in respect of the suit property whereby, the sale price was fixed at Rs.7,290/- and an advance of Rs.1,000/- was paid on that date. The first defendant agreed to pay the balance of Rs.6,290/- within six months and get the sale deed executed. He took possession of the suit property on the date of the agreement itself, i.e., 29.11.1978 and therefore the agreement for sale is true, legal and valid in law.

(c) In spite of repeated demands made by the plaintiffs' power of attorney, the first defendant did not come forward to perform his part of the contract and therefore notice was issued on 28.12.1979 calling upon him to pay the balance of sale consideration and get the sale deed executed. Having received the same, the first defendant has neither sent any reply nor complied with the demand made by the plaintiffs.

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(d) The first defendant is liable to pay damages for use and occupation, as his possession of the suit property has become unlawful and therefore the plaintiffs reserves their right to file a separate suit in respect of other reliefs. The suit property will fetch not less than Rs.400/- per month as rental income. However, the plaintiffs restrict their claim for past mesne profits at Rs.1,000/- representing the damages for use and occupation of the suit property.

5. Since the first defendant died pending suit, his legal representatives are impleaded as defendants 2 to 6. The averments in the written statement filed by the deceased first defendant and adopted by the defendants 2 to 6/ appellants herein are briefly as follows:-

(a) The suit property is a tank porampoke and the first defendant entered into possession of the same in 1940. He spent considerable amount reclaiming the land and also built a house and shop at a cost of Rs.50,000/- in the suit property. He is in open and continuous possession of the suit property and he is also running a grocery shop in the suit property adjoining the road.

(b) The first defendant by his open, continuous and hostile possession for over the statutory period has prescribed title to the suit property by adverse possession. The plaintiffs have suppressed the existence of the superstructure. The suit without a prayer for removable of superstructure is not maintainable. The first defendant is assessed to sales tax in respect of the said grocery shop in the suit property from 1952 and he was running the said business for about 25 years and his sons are carrying on the business for the last 10 years. The suit is bad for non-joinder of the sons of this defendant.

(c) It is denied that the suit property belonged to Meenakshi Ammal and that she had executed a will in respect of the suit property and other properties in favour of the plaintiffs. This defendant therefore denies the truth, validity and due execution and attestation of the alleged will executed by Meenakshi Ammal.

(d) It is false to say that this defendant wanted to purchase the suit property from the plaintiffs and that he entered into the agreement of sale deed dated 29.11.1978. If there is any such agreement, it may be a forged document. There was no necessity at all for this defendant to execute any agreement of sale, as he is in possession of the suit property in his own right.

(e) The plaintiffs never demanded this defendant to perform his part of the contract, as he was not put in possession of the

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property in pursuance of any agreement of sale. He has not acknowledged the title of the plaintiffs to the suit property at any time. Further he has not received any notice from the plaintiffs. This defendant is not liable to pay any damages for use and occupation. Hence the suit may be dismissed with costs.

6. On the above pleadings, the following issues were framed by the trial court for disposal of the suit:-

(1) Whether the suit property belonged to Meenakshi Ammal as alleged in the plaint?
(2) Whether the last will and testament dated 14.11.1969 is true and valid in law?
(3) Whether the agreement of sale dated 29.11.1978 is true and valid?
(4) Whether the plaintiffs are entitled to the suit property?
(5) Whether the defendants acquired title to the suit property by adverse possession?
(6) Whether the suit without a prayer for removal of the superstructure is not maintainable in law?
(7) Whether the suit is bad for non-joinder of necessary parties?
(8) Whether the plaintiffs are entitled to the relief of declaration, recovery of possession and mense profits as prayed for?
(9) To what relief, the plaintiffs are entitled to?

7. The plaintiffs who are respondents in this Second Appeal have let in oral evidence by examining P.Ws.1 to 5 and produced documents Exs.A-1 to A-27 in support of their claim. But on the other hand, the appellants/defendants have not produced any document, but examined three witnesses of whom the deceased first defendant deposed as D.W.1. The learned Additional District Munsif having anlaysed the oral and documentary evidence of the plaintiffs and the oral evidence of defendants and upon hearing both sides rendered the following findings on the above issues:-

"The suit property originally belonged to Meenakshi Ammal; the will dated 14.11.1969 is true and valid in law; the agreement for sale dated 29.11.1978 is true and valid; the plaintiffs are entitled to the suit property; the defendants have not prescribed title to the suit property by adverse possession; the suit is maintainable, as the plaint contained the prayer for recovery of possession of the suit property after removal of superstructure; the suit is not bad for non-joinder of the necessary party; the plaintiffs are entitled to the reliefs of declaration, recovery of possession and mense profits at Rs.300/- per

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month and therefore the plaintiffs are entitled to a decree as prayed for with costs."

8. In the first appeal preferred by the defendants, the learned Subordinate Judge framed the following issues for consideration:-

(1)Whether the first defendant executed the agreement for sale dated 29.11.1978 as claimed in the plaint?

(2) Whether the relief with reference to the removable of super-structure has to be dealt with separately for the purpose of court-fee?

(3) Whether the appeal has to be allowed as prayed for?

9. After analysing the recorded evidence and the arguments advanced on either sides, the learned Subordinate Judge held on the above issues that the plaintiffs have proved the execution of the agreement for sale marked as Ex.A-15, that therefore the first defendant had in fact executed the said agreement in favour of the plaintiffs, that since the construction put up by the first defendant was unauthorised, the suit without a separate prayer for removable of the same is maintainable and payment of court-fee therefor is not necessary, and that ultimately the judgment and decree of the trial court are confirmed and the appeal is dismissed with costs.

10. Heard Mrs.Hema Sampath, learned counsel appearing for the appellants and Mr.T.R.Rajaraman, learned counsel appearing for the respondents.

11. The learned counsel for the appellants has submitted that the courts below failed to see that the plaintiffs failed to prove the agreement of sale, Ex.A-15, as there was no necessity for the defendant to execute the same. Similarly, both the courts ought to have rendered a finding that Ex.A-15 is concocted document, that the defendants were in possession of the suit property in their own right and that the plaintiffs had no title to the same. Similarly, it should have been held that proper court-fee had not been paid and that there was no evidence for arriving at the quantum of mesne profits.

12. In the above circumstances, the following substantial question of law as well as additional substantial question of law were formulated by this court on 30.7.1993 and 29.12.2004:-

(1) Whether the courts below are right in decreeing the suit on the basis of Ex.A-21 which has not been proved as required under Section 68 of the Evidence Act?

(2) Whether in law, have not the courts below omitted to see that when the plaintiffs admit that possession was

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given to the defendants under Ex.A-15, the defendants are entitled to protection under Section 53-A of the Transfer of Property Act?

13. The parties to this Second Appeal may be referred to as they were arrayed in the suit before the trial court for the sake of convenience. The plaintiffs are the daughters of one Meenakshi Ammal and the power of attorney who filed the suit on behalf of the plaintiffs is the husband of the 3rd plaintiff. The plaintiffs instituted the suit through the power of attorney for declaration of title to the suit property and for recovery of possession of the same after removable of the superstructure and for mense profits based on Ex.A-15, agreement dated 29.11.1978 entered into between the power of attorney of the plaintiffs on the one hand and the first defendant (since deceased) on the other. Since the first defendant denied the execution of the said agreement of sale, the plaintiffs examined P.Ws.1 to 3 in order to prove the execution of Ex.A-15 by the first defendant. On this aspect of the matter both the courts below have rendered the concurrent finding that the evidence of P.Ws.1 to 3 has established that the first defendant executed the agreement of sale under Ex.A-15.

14. Though the learned counsel appearing for the appellants/defendants has argued that the courts below have failed to appreciate the evidence on record so as to arrive at the right conclusion regarding the execution of the agreement for sale under Ex.A-15, the evidence of first defendant as D.W.1 has also been taken into account by both the courts below to arrive at the finding that the first defendant had in fact executed the agreement of sale under Ex.A-15. A perusal of Ex.A-15 in the light of the evidence of P.Ws.1 to 3 on the one hand and that of D.W.1, the first defendant on the other would reveal clearly that except the self serving testimony of D.W.1 by denying the execution of Ex.A-15, no tangible evidence has been let in on the side of the first defendant to accept his defence.

15. But, on the contrary, the evidence of P.Ws.2 and 3, scribe and attester respectively would go to show and prove that Ex.A-15 was executed by D.W.1, the first defendant and attested by P.W.3 and another witness and thereafter completed by P.W.2, scribe and it is in these circumstances that the learned counsel for the respondents/plaintiffs has argued and in my opinion rightly that the courts below have rendered the finding regarding the due execution of Ex.A-15 agreement for sale having analysed the evidence in a proper perspective. Hence, this court is of the considered opinion that such concurrent finding of fact rendered by both the courts below has to be sustained.

16. Similarly, the learned counsel for the plaintiffs has drawn my attention to the documents under Exs.A-22 to A-27 and the

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evidence of P.W.5 to show that in pursuance of the bequest under the will, Ex.A-21 the plaintiffs became entitled to the suit property in their own right and that they have also acted upon such bequest by alienating some of the items bequeathed in their favour under Ex.A-21 to P.W.5 and others under the said documents. A careful perusal of the evidence of P.W.5 and Exs.A-22 to A-27 would indicate that the contention of the learned counsel for the plaintiffs in this respect is well founded and therefore the finding of the court below on this aspect of the matter has to be affirmed.

17. The learned counsel for the defendants has submitted that since the plaintiffs have failed to prove the due execution of Ex.A-21, registered will dated 14.11.1969, they have not established the title to the suit property. In answer to such contention, the learned counsel for the plaintiffs has drawn the attention of this court to the concurrent finding rendered by both the courts below on his aspect of the matter to the effect that since both the attesters to the will, Ex.A-21 died and inasmuch as the evidence of P.W.4, the scribe is on record, the execution of the registered will Ex.A-21 by Meenakshi Ammal has been amply proved. It is in the evidence of P.W.4, the scribe of the will that both the attesters are not alive and in view of such evidence of P.W.4 coupled with the registration of the will in accordance with law and production of the same by P.W.1 before the trial court, the learned counsel for the plaintiffs has contended and in my opinion rightly that the above circumstance would cumulatively prove the due execution of Ex.A-21 by Menakshi Ammal.

18. Moreover as has been rightly argued by him, this court is of the opinion that since the first defendant has not claimed any rival title to the suit property through the said Meenakshi Ammal and inasmuch as the evidence adduced by the plaintiffs has amply proved the due execution of the will by the said Meenakshi Ammal, this court is of the considered opinion that the concurrent finding rendered by the courts below does not suffer from any illegality or perversity. It follows necessarily that the submissions made by the learned counsel for the defendants that the plaintiffs have no title to the suit property as they have not proved the execution of Ex.A-21, registered will is not acceptable in view of the evidence adduced by the plaintiffs on this aspect of the matter.

19. The last contention of the learned counsel for the defendants is that on the admitted ground of possession of the suit property by the first defendant, under Section 53-A of the Transfer of Property Act, 1882 the defendants are entitled to retain the possession of the suit property.

20. Section 53-A of the Transfer of Property Act 1882 may be

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extracted hereunder to appreciate the facts and evidence of the case:-

> "53-A. Part performance.-- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
> and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,
> and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:
> Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

21. The learned counsel for the defendants reiterated the decision SADASHIV CHANDER BHAMGARE v. EKNATH PANDHARINATH NANGUDE (2004(4) C.T.C. 465) in support of the proposition that the transferee in possession is entitled to defend such possession under the provision of Section 53-A of the said Act. As has been rightly pointed out by the learned counsel for the plaintiffs, in view of the ratio laid down in the decision RAM KUMAR AGARWAL v. THAWAR DAS (AIR 1999 S.C. 3248), the defendants who have failed to perform their part of the contact under Ex.A-15 are not entitled to claim protection of their possession of the suit property under Section 53-A of the said Act.

22. The ratio laid down in the said decision reads as follows:-

> "Plea under Section 53-A of the Transfer of Property Act raises a mixed question of law and fact and therefore cannot be permitted to be urged for the first time at the stage of second appeal. That apart, performance or willingness to perform his part of the contract is one of the essential ingredients of the plea of part performance.

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> Thawar Das having failed in proving such willingness, protection to his possession could not have been claimed by reference to Section 53-A of the Transfer of Property Act."

23. In view of the concurrent finding of the courts below on the basis of the recorded evidence that since the defendants failed to perform their part of the contract under the agreement Ex.A-15, the plaintiffs are entitled to the reliefs as prayed for, this Court finds that the contention of the learned counsel for the plaintiffs is acceptable on the basis of the above said decision. It follows that the defendants are not entitled to raise any plea under Section 53-A of the Transfer of Property Act in view of their non-performance on their part of the contract.

24. On this aspect, the learned counsel for the plaintiffs has drawn my attention to the decision ROOP SINGH v. RAM SINGH (2000 (3) S.C.C. 708) in support of his contention that the plea of adverse possession adumbrated by the first defendant in the written statement is inconsistent with the plea of right to possession on the basis of the part performance under Section 53-A of the Transfer of Property Act, 1882. It is no doubt true that the first defendant has pleaded specifically in his written statement that he has perfected title to the suit property by adverse possession by the open, continuous and hostile possession of the same from 1940. As has been found by both the courts below on the basis of the evidence adduced on the side of the defendants, no document has been produced by the defendants to prove such plea of adverse possession. As a matter of fact, it is seen from the records of the case that apart from the evidence of the first defendant as D.W.1 and two other witnesses as D.Ws.2 and 3, no document had been produced by the defendants before the trial court to establish their claim of adverse possession of the suit property as pleaded in the written statement filed by the first defendant.

25. In view of such circumstances, the claim of the defendants in this Second Appeal that they are entitled to the protection under Section 53-A of the Transfer of Property Act cannot be countenanced in view of the ratio laid down by the Apex Court in the decision referred supra and the same reads as follows:-

> "It is also to be stated that the pleas of adverse possession and retaining the possession by operation of Section 53-A of the Transfer of Property Act are inconsistent with each other. Once it is admitted by implication that the plaintiff came into possession of the land lawfully under the agreement and continued to remain in possession till the date of the suit, the plea of adverse possession would not be available to the defendant unless it has been asserted and pointed out hostile animus

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of retaining possession as an owner after getting in possession of the land."

26. Having regard to the facts and circumstances of the case in the light of the principle of law laid down in the decision cited above, this Court is of the considered view that the plea of adverse possession as well as the contention that by operation of Section 53-A of the Transfer of Property Act, the defendants are entitled to retain possession of the suit property are mutually inconsistent and therefore on this aspect of the matter, I am unable to accept the submission made by the learned counsel for the defendants. For the reasons stated above, this Court finds that the concurrent findings of both the courts below that the plaintiffs have proved title to the suit property, that the first defendant executed the agreement of sale Ex.A-15 in favour of the plaintiffs and that the defendants have not perfected title to the suit property by adverse possession are sustained.

27. Similarly, in respect of the question of law now raised in this Second Appeal that the defendants are entitled to retain the possession of the suit property by operation of Section 53-A of the Transfer of Property Act 1882, this Court finds that such an argument is not acceptable in view of the above finding. For the reasons stated above, this Court is of the considered view that the Second Appeal deserves no merit and is liable to be dismissed.

28. Thus, the Second Appeal is dismissed with costs by confirming the judgment and decree passed by the Additional Subordinate Judge, Cuddalore in A.S.No.16 of 1992 dated 26.8.1992.

Sd/
Asst.Registrar

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Sub Asst.Registrar

dpp
To
1. The Additional Subordinate Court, Cuddalore.(with records)
2. The Additional District Munsif, Cuddalore.
3. The Section Officer, V.R.Section, High Court, Madras.
+1cc to Hema sampath,Advocate SR.No.24992
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Judgment in
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